IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 80-1806

DAVID R. HARRIS, Superintendent, Greenhaven Correctional Facility, ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Brief for Respondent in Opposition

RUTH CASSELL
DAVID C. LEVEN
PRISONERS' LEGAL SERVICES
OF NEW YORK
Attorneys for Respondent
20 Vesey Street
New York, New York 10007
(212) 285-0370

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FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

BRIEF FOR RESPONDENT LAUREANO IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals correctly decided that Respondent Laureano was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution because an actual conflict of interest due to multiple representation adversely affected his trial attorney's performance and that Respondent Laureano has not waived his rights to separate counsel.

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OPINIONS BELOW

The petitioners, David R. Harris, the Superintendent of the Greenhaven Correctional Facility et ano have asked this court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 11, 1981. The order of the Second Circuit Court of Appeals which is reproduced in Petitioners' Appendix A at pages 1a-3a, affirmed the order of the District Court on the opinion of the Hon. Morris E. Lasker, which has been reproduced in Petitioners' Appendix B at pages 5a-11a. Judge Lasker's opinion in turn incorporated and affirmed the Magistrate's Report reproduced in the Appendix to Respondent Bonilla's Brief in Opposition at pages 1RA-35RA.

JURISDICTION

Respondent, Jose Laureano, incorporates Petitioners' jurisdictional statement found on page 2 of the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to effective assistance of counsel in the Sixth Amendment to the United States Constitution, set forth at page 2 of the Petition, and the right to due process in the Fourteenth Amendment to the United States Constitution, set forth at pages 2-3 of the Petition.

STATEMENT OF THE CASE

Respondent respectfully submits that the questions presented in the petition, addressing as they do the broad issues of actual conflict and purported consent are inextricably intertwined with the very particular facts of this case as they occurred both during the State Court trial and subsequent appeals as well as the post conviction remedy pursued by Respondent Laureano. Because these facts are essential to an understanding of the opinions below, the evidence at trial is outlined first, followed by a discussion of the prior proceedings in the state and federal courts.

EVIDENCE AT TRIAL

On the night of January 28, 1972, three friends, Jose Bonilla, Fernando Bermudez and Jose Laureano, were walking along the sidewalk on Simpson Street in the Bronx. William Travieso, who lived nearby, was walking in the opposite direction, and jostled Bonilla as he passed the three friends. Words were exchanged and a fist fight erupted.

Travieso's friends and family came out into the street to intervene in the fighting. Travieso was knocked to the ground and someone was on top of him. At least one person had a knife and Travieso was stabbed. He died of a single stab wound.

The prosecution witnesses consisted primarily of those members of Travieso's family and those friends who intervened in the fight. Different witnesses saw different things, and the sequence of events was confused, at best. Despite the confusion concerning which of the other defendants were where when, none of the witnesses placed Respondent Laureano in a position where he could possibly have been the

person who stabbed William Travieso! In fact, several witnesses placed Laureano on the sidewalk behaving like a spectator at a boxing match.

Laureano was charged along with Bermudez and Bonilla in Bronx County Indictment 830/72 of "acting in concert" to commit intentional murder [New York Penal Law §125.25(1)], and of "acting in concert" to possess a weapon [former New York Penal Law §265.05 repealed, L. 1974, Ch 1041, eff. September 1, 1974, now at New York Penal Law §265.01]. The three defendants went to trial before the Honorable William Kapelman, J.S.C., and a jury. All were represented by a retained attorney, Stanley L. Siegel, Esq., of the law firm of Siegel, Graber, and Bourgeois.

The prosecution's theory was that each defendant was guilty of "acting in concert" to kill Travieso. No attempt was made to establish which person inflicted the fatal stab wound. Defense counsel presented a unified defense, making no attempt to distinguish degrees of intent and culpability among his clients. Essentially, counsel argued that because no one had seen the stabbing, anyone could have killed Travieso. It could have any member of his family or friends. Because of his obligation to his three jointly-represented clients, Laureano's counsel was neither able to cross-examine the witnesses against Laureano in a manner so as to clarify the sequence of events and the extent of participation by each of the co-defendants because questioning of this type would obviously redound to the disadvantage of the other defendants, nor could he argue that Laureano had engaged in an assault but had then withdrawn, unaware of the intentions of his co-defendants.

The jury returned a verdict of guilty of murder and possession of a weapon as to all three defendants. Each was sentenced to concurrent terms of 15 years to life imprisonment

for the charge of possesion of a weapon.

THE APPEALS

Laureano appealed from the judgment of conviction claiming that he had been denied effective assistance of counsel as a result of the joint representation of all three defendants. His conviction was affirmed by the Appellate Division of the New York State Supreme Court, First Department, 46 A.D.2d 1014 (1974), and leave to appeal to the New York State Court of Appeals was denied on January 22, 1975.

THE MAGISTRATE AND DISTRICT COURT

In his petition for a writ of habeas corpus filed in the United States District Court for the Southern District of New York in February 1978, Respondent Laureano presented his claim that he had been denied effective assistance of counsel at his criminal trial as a result of the multiple representation of the three co-defendants by one attorney. The petition was consolidated with that of Respondent Bermudez and referred to a Magistrate.

During the habeas proceedings, affidavits were submitted by the state court trial judge and by defense counsel Seigel, containing contradictory allegations as to whether an inquiry had been made by the trial court concerning multiple representation and the extent of such inquiry, if any. In his affidavit, defense counsel Seigel alleged that before trial in an off-the-record conference, he informed the judge that a conflict existed and requested that his clients have separate counsel. Mr. Seigel's affidavit went on to say that the trial judge replied that his request was a "stalling technique." The trial judge's affidavit stated that it was he who had raised the issue with defense counsel at an off-the-record con-

ference, and that Seigel had assured him that no conflict existed among the defenses of the three co-defendants. Based upon these affidavits, the Magistrate specifically concluded that the allegations of the trial judge, even if accepted, did not make out consent to joint representation. RA 17.

After issuance of the Magistrate's report, the trial judge submitted a second affidavit in which he remembered that defense counsel had given his assurance in open court in an off-the-record discussion in the presence of all three respondents, that no conflict existed.* The judge further stated in his second affidavit that he "believe[d] he questioned the three defendants directly and that they all agreed to the joint representation." The District Court considered the second affidavit of the trial judge, noting that it was filed "[s]omewhat suprisingly," after the issuance of the Magistrate's Report. In spite of this second affidavit, the District Court did not modify the Magistrate's conclusions. The District Court adopted the findings of the Magistrate and granted the writs holding that respondents had exhausted their state remedies and that they were prejudiced by the joint representation.

THE COURT OF APPEALS

The questions presented to the Court of Appeals for the Second Circuit by the State were whether State remedies had been exhausted and whether the Respondents had been prejudiced by the joint representation. On November 26, 1979, the

* Transcripts for all the pre-trial proceedings in People v. Jose Bonilla, Jose Laureano and Fernando Bermudez, obtained by Diana Budzanoski, attorney for Bonilla, and made part of the District Court record reveal only two off-the-record conversations at the bench during this pre-trial period. The defendants were not present at either bench conference.

Court of Appeals summarily affirmed the granting of the writ on the opinion of the District Court. The State next petitioned this Court for a writ of certiorari on the question of whether three defendants who have jointly retained one attorney to represent them in a criminal trial can consent to such joint representation in response to an inquiry by the trial judge, thereby waiving their right to subsequently challenge the joint representation as ineffective under the Sixth and Fourteenth Amendments to the United States Constitution. On May 27, 1980, this Court granted Respondents' motions for leave to proceed in forma pauperis as well as the petition for a writ of certiorari, vacated the judgment and remanded the case to the Second Circuit for further consideration in light of Cuyler v. Sullivan, 446 U.S. 335, Harris v. Bermudez, 446 U.S. 962 (1980).

Upon reconsideration, the United States Court of Appeals for the Second Circuit held that the findings of the District Court and the report and recommendation of the Magistrate complied with the standard enunciated in Cuyler, supra, and affirmed the order of the District Court granting the petition for habeas corpus.

REASONS FOR DENYING THE WRIT

The three questions presented by the State to this Court for resolution do not dispute the application of the Cuyler v. Sullivan, 446 U.S. 335 (1980), standard, followed by this Court in Wood v. Georgia, 49 U.S.L.W. 4218 (March 4, 1981), requiring a defendant to show that a actual, not possible conflict of interest adversely affected his lawyer's performance. Rather, this Court is asked to determine whether on the very particular facts of this case, Respondents could be held to have consented to the multiple representation, thereby waiving their right to argue on appeal that such multiple representation failed to provide them with the effective assistance of counsel mandated by the Sixth and Fourteenth Amendments to the United States Constitution.

At this point in the proceedings, the fact that multiple representation actually adversely affected the performance of Respondent Laureano's attorney cannot be seriously challenged. In effect, the State has conceded this issue by not raising it as a question to be addressed by this Court. It is, however, mentioned in Petitioners' brief and therefore must be addressed herein. Based upon the detailed findings set forth in the Magistrate's Report and Recommendation, the Second Circuit held "...[that] there existed an actual conflict of interest in the present case. The only available defense to the prosecution where all three defendants were represented by the same lawyer was that perhaps none of the three stabbed the victim's family. There was no possibility for one defendant to attempt to disassociate himself from the others. Such a defense was no defense at all." (Emphasis in original. See Appendix A, page 3a.) This observation is certainly not based upon judicial speculation, as asserted by Petitioners.

Further, in Cuyler, supra, and Wood, supra, this Court based its analysis of whether an actual conflict existed, in part, upon whether trial strategies helpful to one client existed which an attorney could not utilize because of joint representation. Thus, it is beyond dispute that a Sixth Amendment violation occurs if a trial strategy is available on behalf of one client but is not presented because of a conflict resulting from multiple representation.

William Travieso died of one stab wound; therefore, only one of the three defendants on trial could have been the actual killer. The State did not know which one. The State offered to let the defendants plead guilty on the following terms: two of the defendants would plead guilty and receive jail sentences of one year. The actual killer would plead guilty and receive a jail sentence with a maximum term of imprisonment for four years. The decision as to which defendant would receive a particular plea and sentence was left up to the individual to decide, but the State did insist that the plea be an "all or nothing" deal, either all three plead guilty or all three go to trial. See RA pp. 32-33.

In the absence of any positive identification as to who the actual killer was, with no knife having been recovered, lacking any post arrest confessions or admissions, and finding no bloodstains on the clothes of any of the defendants, there is every valid reason to believe that the State was prepared to bargain for the testimony of at least one or possibly two of the defendants against the actual killer. Obviously, joint counsel could never indulge in such plea bargaining or even suggest it to defendants without violating his professional responsibility to the remaining defendant(s). Colon v. Fogg, 603 F.2d 403, 408, n.5 (2nd Cir. 1979); Holloway v. Arkansas, 435 U.S. 475, 491 (1978).

As the District Court found, based upon the undisputed factual showing before it:

> [W]here the State lacked conclusive evidence as to which of the three defendants actually committed the stabbing, an independent lawyer might have worked out a special 'deal' for his client in exchange for an agreement to testify. See Appendix B, p. 11a.

During the course of the trial itself, the prosecution did not attempt to prove which of the defendants had inflicted the fatal wound, but proceeded under the theory that all three defendants were "acting in concert." The question to be answered by the jury, therefore, was whether each individual defendant had formed the intent to kill. See: People v. May, 9 A.D. 2d 508, 509-13 (1st Dept. 1960). In the face of the prosecution's burden of proof on the question of the murderous intent of each individual defendant and the substantially weaker evidence implicating Laureano in the murder, the District Court concluded that separate counsel might well have successfully dissociated a defendant from the murder and convinced a jury that a defendant lacked the intent required to convict. Additional examples of the actual conflict affecting Laureano's trial attorney are found in the Statement of the Case at p. 4 , supra. For the reasons stated in the preceeding paragraphs, it is clear that an actual, not speculative, conflict of interest existed which adversely affected Mr. Seigel's performance.

In a roundabout manner, Petitioners pose the question of whether Respondent Laureano consented to multiple representation, thereby waiving his right to argue on appeal that such representation failed to provide him with effective assistance of counsel mandated by the Sixth and Fourteenth Amendments to the United States Constitution. The correct standard to be applied here is whether Respondent waived his right to independent counsel, not whether or not Respondent

consented to such representation. Wood v. Georgia, 49 U.S.L.W. 4218, 4221 (March 4, 1981). The difference between consent and waiver is crucial.

The State's assertions notwithstanding, this Court has imposed a duty upon a trial court to inquire further when it knows,or reasonably should have known, that a possibility of a conflict exists. Cuyler, supra, at p. 1117, Wood, supra, at p. 4220. Assuming the affidavits of the trial judge to be true, such inquiry was held; however, even reading the trial judge's affidavits in their most favorable light, no case can be made out that Respondent Laureano waived his right to independent counsel. Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938).

In order to establish a waiver, it must be shown that the accused was told the nature of the conflict, the disabilities which the conflict may palce on the lawyers in the conduct of the defense, and the nature of the claims which may be waived if the choice is to proceed with one lawyer. United States v. Armedo-Sarmiento, 524 F.2d 591, 593 (2d. Cir. 1975). The client must be "fully aware of the nature of the conflict and understand the potential threat to the protection of his interests." In Re Taylor, 567 F. 2d 1183, 1191 (2d Cir. 1977). He must have full knowledge of the potential adverse consequences of joint representation. Taylor, supra.

The standard for waiver applied by the circuits other than the Second Circuit is similarly expressed and requires an exploration and explanation of the risks of joint representation so that the defendant understands that what is in one defendant's best interests may not be in the best interests of a co-defendant. United States v. Donahue, 560 F. 2d 1039, 1043-1044 (1st Cir. 1977); see also Gray v. Estelle, 616 F. 2d 801, 804 (5th Cir. 1980); United States v. Quinones,

613 F. 2d 47, 49 (3d Cir.), cert. denied, 446 U.S. 937 (1980); Zuck v. Alabama, 588 F.2d 436,440 (5th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Gaines, 529 F. 2d 1038, 1044 (7th Cir. 1976); United States v. Mandell, 525 F. 2d 671, 677 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976).

Neither of the two affidavits of the trial judge, the contents of which are outlined in the Statement of the Case at pp 5-6 supra, if taken as truth, indicates that an inquiry was made which was sufficiently thorough as to support a conclusion that Respondent Laureano waived his right to independent counsel. Neither affidavit indicates that Respondent was informed and understood the nature of the conflict, the threat of the conflict to the protection of his interests, the potential adverse consequences of joint representation, or that what was in his best interests was not in the best interests of his co-defendant. At best, the affidavits merely indicate the possibility of an unknowing and uninformed consent.

Respondents here ask this Court to determine whether a federal court, in the interest of comity, must afford the State court the opportunity to hold a fact-finding hearing to determine whether jointly represented criminal defendants consented to multiple representation.* This issue was specifically addressed by the District Court which held that to return this matter to the State court would be an exercise in futility. "The concept of futility must be interpreted to encompass notions of economy and fairness. Thus unless new material creates at least a moderate likelihood of a dif-

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* Petitioners apparently framed this question in mistaken reliance on Kaplan v. Bombard, 573 F.2d 708, 714 (2d Cir. 1978) in which that court held that the decision to be jointly represented was one of consent not waiver, "...a decision to assert one's constitutional right instead of another." This Court has recently adopted the waiver standard. Wood, supra, at p. 4221.

ferent result, it is futile to send an action back to the state courts." Appendix B, page 9a. See also: Fay v. Noia, 372 U.S. 391, 420 (1963).

It is clearly unlikely that in this stage of the proceedings, the state courts would reach a different result on the question of consent. Respondent expressly denies ever hearing discussion of a conflict of interest. Defense counsel Seigel denies that such discussion ever occurred. The District Attorney handling the matter, in an affidavit submitted to the District Court, makes no reference to any discussion in open court. Petitioners have conceded this issue by failing to raise it both in their prior application to this Court and in the Court of Appeals for the Second Circuit. The State must therefore be deemed to have waived this issue at this stage of the proceedings.

This case is clearly distinguishible from Sumner v. Mata, U.S. , 101 S. Ct. 764 (1981); Wainwright v. Sykes, 433 U.S. 72 (1977); and Stone v. Powell, 428 U.S. 465 (1976) on its facts as well as its legal posture. In Sumner, supra., Wainwright, supra., and Stone, supra., this Court barred habeas corpus relief where the issue raised in the federal court was never raised on direct appeal to the State courts. Respondent Laureano raised the issue of conflict of interest in his state court appeal. This appeal was denied. Furthermore, he could not challenge the judgment of conviction in a collateral proceeding in the state court because under the New York Criminal Procedure Law §440.10(2)(a) (McKinney, 1979), the court must deny a motion to vacate a judgment when the "ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment."

Petitioners' claim that the District Court and the Court of Appeals completely disregarded the trial judge's affidavits in which Respondents are alleged to have consented to proceed with their retained counsel is incorrect. The Magistrate considered the question of consent at length, examined the allegations supporting a finding of consent, and concluded that Laureano did not consent. The District Court adopted the Magistrate's recommendations, and in its decision referred to the trial judge's second affidavit which was submitted after the Magistrate's Report and Recommendation. (8a-9a, 11a, n.2). Obviously, either the District Court disbelieved the trial judge's allegations or determined that his affidavit did not alter the finding of lack of consent.

In conclusion, for the reasons stated above, Respondent Laureano submits that this case is not appropriate for review on writ of certiorari and the writ should not be granted.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted

Ruth Cassell

Ruth Cassell
David Leven

Attorneys for Respondent
Laureano

Dated: New York, New York
May 1980

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Respondents.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Jose Laureano, hereby moves this Honorable Court pursuant to Rule 53 for an order permitting him to file his Response to the Petition for a Writ of Certiorari and otherwise proceed in the Court in forma pauperis. In support of his motion, respondent relies upon his annexed Affidavit, sworn on May 14, 1981.

Dated: New York, New York
May 15, 1981

RUTH CASSELL
DAVID C. LEVEN
Prisoners' Legal Services of New York
20 Vesey Street, 8th fl.
New York, New York 10007
Attorney for Respondent-
JOSE LAUREANO
(212) 285-0370

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AFFIDAVIT IN SUPPORT OF MOTION OF JOSE LAUREANO TO PROCEED IN THE SUPREME COURT OF THE UNITED STATES IN FORMA PAUPERIS

I, JOSE LAUREANO, being first duly sworn, on oath, depose and say that I am respondent in the above-entitled cause; that in support of my motion to proceed in opposition to the petition for a writ of certiorari and in any further proceedings in this Court without being required to pay fees or to submit printed briefs, I state that because of my poverty I am unable to pay costs of said proceeding or give security therefor; that I believe I am entitled to redress; and that the position which I desire to present in opposition to the petition for a writ of certiorari is the following:

Certiorari should not be granted to review the order of the United States Court of Appeals for the Second Circuit upon remand for reconsideration in light of Cuyler v. Sullivan, 446 U.S. 335 (1980), Harris v. Bermudez, 446 U.S. 962 (1980). Said order of the Court of Appeals for the Second Circuit affirmed the District Court's decision and held that such decision complied with the standard articulated by this Court in Cuyler, supra, for determining Sixth Amendment cases in which an assertion is made by a

criminal defendant that he was deprived of effective assistance of counsel arising from multiple representation.

The order of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other court of appeals.

I further swear that the response which I have made to the questions and instructions below, relating to my ability to pay the costs of responding to the petition for a writ of certiorari or the costs of any further or other proceedings in this Court are true.

1. Are you presently employed? Yes

If yes, where are you working? Public Fuel Heat Services, 357 East 116th Street, New York, New York

When do you begin working? Began working October, 1980

What is your weekly salary? $163.00 net salary

2. Have you received within the past twelve months any income fron a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? No

3. Do you own any cash or checking or savings account? No

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property, excluding ordinary household furnishings and clothing? No

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

6. Prisoners' Legal Services has been representing me in this matter since its inception and is fully familiar with the facts, issues, and legal history. It would be impossible for me to secure other representation at this time.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

José Laureano

JOSE LAUREANO

Subscribed and sworn to before me this
14 day of May, 1981

Ruth Cassell

NOTARY PUBLIC

RUTH CASSELL
Notary Public, State of New York
No. 31-4607156
Qualified in New York County
Commission Expires March 30, 1983